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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1200

HENRY B. McFARLAND,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1966

No.

HENRY B. MCFARLAND,

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—against—

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Henry B. McFarland, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case as recited *infra*.

Opinion Below

The opinion of the Court of Appeals, printed in Appendix 1 hereto *infra*, is not yet reported. The District Court did not render any formal opinion as such.

Jurisdiction

The judgment of the Court of Appeals was entered on January 5, 1967 (Appendix 3 hereto, *infra*). A timely peti-

tion for rehearing, and an accompanying timely petition for rehearing *en banc,* were denied by the Court of Appeals on January 26, 1967. Mr. Justice Harlan, by order, has extended the time for filing this petition for certiorari to and including March 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner, who for many years had been Warden of a County Jail in New Jersey, was convicted of perjury before a Federal Grand Jury in the Southern District of New York. The Grand Jury was investigating alleged Mann Act violations arising from alleged visits by prostitutes to prisoners at the New Jersey jail. As the result of certain failures of proof and certain procedural rulings in petitioner's perjury trial, the case went to the Trial Jury with all Mann Act or prostitution items or charges having been excluded from the trial Jury's consideration. The only perjury charges submitted to the trial Jury were that petitioner had lied to the Grand Jury in answering questions about use of the telephone by prisoners under his charge, and about other privileges such as special food and social visits allegedly extended to prisoners. Thus the only matters submitted to the trial Jury concerned whether petitioner had lied to the Grand Jury about internal housekeeping incidents at the New Jersey jail, none of which were tied in with any of the Mann Act charges in the indictment. The case involves also improper and prejudicial conduct by the trial prosecutor which the Court of Appeals deemed sufficiently serious to warrant the inclusion in its opinion of a reprimand to the Government. The questions are:

1. In view of the elimination from the case, as submitted to the trial Jury, of all Mann Act references except the purely formal continuing allegations of the Grand Jury "purpose" or "materiality", i.e., in view of the fact that the case as submitted to the trial Jury retained only rump character as a "Mann Act perjury" case and thereby stood wholly detached from its original supposed Mann Act Grand Jury character with nothing left in the case except alleged perjury concerning purely internal housekeeping matters at a local jail, was not submission of the case to the trial Jury unjustified as working a subversion of any fair or sensible purpose of the Federal perjury statutes?

2. Does not the hypertechnical and utterly formalistic interpretation of the principles of Federal Grand Jury "materiality" and "competency" needed to justify submission of such a perjury case to a trial Jury, amount to a violation of due process of law?

3. Does not this really extraordinary application of the Federal perjury laws violate substantive and not merely procedural due process, i.e., does not the case become one of violation of substantive due process in that it is substantively unreasonable to allow Federal prosecution and conviction for Grand Jury perjury in a matter so remote from, indeed so totally lacking connection with, any legitimate object of Federal concern?

4. Do not this prosecution and conviction violate even the very subject matter jurisdiction limitations which the Constitution imposes on the power of the United States to punish crimes, inasmuch as the case as submitted to the trial Jury ended up being, literally, nothing more than a case of alleged perjury as to a subject matter which was

in the exclusive jurisdiction of the State of New Jersey under the distribution of powers in the Federal-State system?

5. Simply from the standpoint, furthermore, of rational administration of the trial jury system, was it not prejudicial error in terms of fair due process trial to submit for any trial jury's consideration the abstract vestiges of this "perjury" case, when neither charges nor proofs remained in the case from which a trial jury could rationally and justly deduce a verdict of conviction under this Mann Act perjury indictment?

6. When, as here, an initially ostensible subject matter of Federal Grand Jury "competence" or "materiality" washes out, during the subsequent perjury trial, into an empty abstraction, does not the case take on the character of outright "failure to charge an offense", i.e., when the indictment is considered (as it must be) in the truncatedly excised form in which it was here submitted for the Jury's final consideration?

7. Indeed further, having in view all of the foregoing, has it not resulted in this case that petitioner has been convicted for an offense not charged at all in the indictment, i.e., the alleged offense of having falsely denied to a Federal Grand Jury that he accepted payment for non-Federally cognizable "housekeeping" favors to prisoners in a local or State prison institution governed by State law?

8. Insofar as this perjury prosecution has depended also on alleged "materiality" of a Federal Grand Jury subject matter said to arise under the Federal Communications Act, i.e., insofar as the case involves or initially involved

(prior to the elimination of all Mann Act aspects) alleged use of telephones in aid of Mann Act prohibited prostitution activities, has not petitioner been unconstitutionally prosecuted and convicted in that there does not actually exist any Federal "crime" of violating the Federal Communications Act by using or permitting the use of telephones to violate the Mann Act; and does not the view adopted in recent years by some of the lower Federal Courts that one can "violate" the Federal Communications Act by "illegal" use of the telephone (as for gambling, prostitution, narcotics violations etc.), rest upon an uncritical and demonstrably erroneous set of assumptions which have no basis in legislation and which could not constitutionally be read into the Federal Communications Act because any such supposedly proscribed "illegalities" in use of telephones are derivable, if at all, only from "tariffs" filed with the Federal Communications Commission by private telephone companies, so that the Federal "crime" of "illegal" telephone use exists only by virtue of "legislation" by private persons (the telephone companies), whose filed "tariffs" moreover do not even effectively come to the knowledge or attention of prospective "defendants"—which last raises also the due process question of adequate notice or apprisal to persons who may become subject to charges of Federal "crime" without ever having had, realistically or practically speaking, any knowledge or warning of the existence of a Federal "law" forbidding such "criminal" conduct?

9. Was petitioner denied a fair trial and due process of law by the conduct of the prosecutor in having called to the stand a female witness who was to give exceedingly inflammatory testimony against petitioner, and who to the

knowledge of the prosecutor had a recent history of severe psychological disturbance, the prosecutor not disclosing these psychiatric facts concerning the witness until after her direct testimony had become a fait accompli lodged upon the record, and the prosecutor even then having continued to try to conceal from the defense these psychiatric facts, i.e., even after the witness had completed her direct testimony and the defense was preparing to cross-examine her?

10. Do not the combined points raised in the above questions call for this Court's intercession by certiorari in the interests of the fair administration of Federal criminal justice?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment due process clause. It also involves 18 U.S.C. § 1621 (perjury), and 47 U.S.C. §§ 201(b), 203, 409(1) and 501 (Federal Communications Act). These latter statutes are quoted in Appendix 5 hereto, *infra*. The case also involves 18 U.S.C. §§ 2421 and 2422 (white slave traffic), but these latter provisions have no direct bearing on any issue raised in this petition and we therefore do not quote them.

Statement of the Case

1. Introductory

Petitioner Henry B. McFarland was convicted in the United States District Court for the Southern District of New York (Croake, D.J.), after a jury trial, on two counts of perjury allegedly committed before a Grand Jury (18

U.S.C. § 1621), and he was sentenced to six months on one count (Count Two) and one year and six months and a fine of $1,000 on the other count (Count Three), the execution of the prison sentence on the latter count being suspended and petitioner being placed on unsupervised probation for the period of that sentence to begin upon the expiration of the six month sentence imposed on the former count (67a*). The within perjury indictment originally contained four counts, but Counts One and Four were dismissed as a matter of law by the Trial Court (Tr. 1339-1343, 1372-1376, 1757-1760)—details as to this striking of counts of the indictment, a matter of prime importance in the case, are presented *infra*. Petitioner is free on bail of $1,000 pending this certiorari application, and payment of the fine above mentioned is stayed pending the within proceedings.

On appeal to the United States Court of Appeals for the Second Circuit, the judgment of conviction was affirmed (details *infra*).

Petitioner McFarland, a man seventy-two years of age who has spent his entire adult life as a law enforcement officer in Hudson County, New Jersey, became involved in this perjury prosecution as the result of testimony which

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* " a" refers to the printed Appellant's Appendix in the Court of Appeals. Nine extra copies of that printed Appendix, and of the printed Appendix For The United States Of America in the Court below, are filed herewith. The appellant's printed appendix in the Court below did not include any trial testimony, and the Government's printed appendix included only certain short portions of the trial proceedings. References to items in the trial transcript which are not contained in the printed appendices will appear herein as "Tr. " or, as the case may be, as "R. "(when referring to portions of the record on appeal in the Court below other than the trial transcript as docketed in that Court). Our filing herein of the record in the Court below includes the trial record.

he gave before a New York Southern District Grand Jury investigating alleged visits by prostitutes to inmates of the Hudson County Jail of which Mr. McFarland was the warden since 1951. As we shall show, the central fact which emerges from this trial record is that all charges and proofs relating to Mann Act activities or indeed relating to any alleged improprieties or even questionable happenings involving females at the Hudson County Jail, became eliminated from the case, under rulings of law by the Trial Judge before submission of the case to the Jury—hence the dismissal of Counts One and Four and the elimination of references to females in Count Three (details *infra*). The case *as it went to the Jury*—under the remaining counts of the indictment, Counts Two and Three—in effect involved only alleged perjurious Grand Jury testimony by Warden McFarland concerning his alleged personal participation in (1) allowing Hudson County Jail inmates to use the telephone,* and (2) allowing such inmates certain special privileges of quartering, food facilities, visiting and the like.**

As to aspects of the indictment involving alleged violations of the Federal Communications Act by reason of the telephone-use above mentioned—which the Government contended had a bearing on the Mann Act charges—we expect to demonstrate in this petition that as a matter of law no Grand Jury inquiry concerning such telephone use *even if such was connotative of Mann Act activities* (which we deny) was "competent" within the meaning of the perjury statute (18 U.S.C. §1621) because the pattern in recent

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* Again, no prostitution or otherwise improper aspects in relation to females being involved in any such telephoning.

** Again, no prostitution or relatedly improper activities were involved in this last.

years of this kind of "telephone" investigation by Federal prosecutors and Grand Juries proves to be, upon analysis of the applicable legislative and administrative provisions, absolutely and literally *ultra vires*, there being no valid legal foundation for Federal criminal investigation or prosecution in this area of use of telephones for allegedly "illegal" activities. In short we expect to show in this petition that, by reason of the elimination from the case of the alleged Mann Act subject matter and by reason of the inapplicability of the Federal Communications Act subject matter as a matter of law, the grounds for finding Grand Jury "materiality"—or indeed statutory "competency" under 18 U.S.C. §1621—in the allegedly perjurious testimony of the petitioner concerning telephones and other special jail privileges of a non-prostitution-connected type are insufficient to sustain the within charges of perjury.

2. The Indictment, and the Items in the Indictment Which the Trial Court Eliminated from the Jury's Consideration

Prime importance attaches in this case to the excisions from the indictment (6a) which the Trial Court determined must be made in submitting the case to the Jury. For a full understanding of the importance of these excisions, it is of course necessary to have some details of the trial testimony, which we treat under a later subheading in this statement of the case. It is convenient, however, to have a complete comparison of the original text of the indictment *vis a vis* the text of the indictment in the form in which it was submitted to the Jury, and in Appendix 4 hereto *infra* we print such a comparative text, in which we set forth the original provisions of the indictment in their entirety with suitable markings, by italicized type, to show

at a glance what was excised by the Trial Court. It will be noted in that partially italicized text of the indictment which appears in Appendix 4 hereto *infra* that the charging parts of Count One (commencing with par. 4 of that count) and all of Count Four are completely stricken out (italicized). It will be noted also that substantial portions of Counts Two and Three were stricken out by the Trial Court.

The indictment as it came from the Grand Jury was, of course, oriented dispositively towards the allegations relating to visits by prostitutes at the Hudson County Jail (Mann Act), with which were connected (likewise dispositively in point of Grand Jury purpose) the allegations as to use of telephones at the jail (Federal Communications Act). By the Trial Court's elimination of Counts One and Four plus its excisions from Counts Two and Three,* there were eliminated from the indictment all Mann Act allegations, and in fact there were eliminated all references to visits by females with the single exception of one group of questions and answers recited in Count Three;** this last mentioned item in Count Three concerning females stands, in the excised version of the indictment, in a setting which has no relation to Mann Act charges or any sexual improprieties whatever. In short, what remained in the indictment after the dismissals and excisions by the Court, con-

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* The excisions from Counts Two and Three consisted *inter alia*, of the respective paragraphs in each of those counts in which the Grand Jury had repeated and re-alleged the first three paragraphs of Count One, which the Court dismissed in its entirety.

** Indeed, there is a serious question as to whether the failure to eliminate the item just mentioned was an inadvertence, i.e., whether the Trial Court had intended also to eliminate the latter sole reference to visits by females (Count Three) (Tr. 1761-1774, 1779-1784).

sisted solely of allegations that the defendant had permitted prison inmates to have special telephone privileges and other special privileges (not connected with prostitution or sex), that he had done this for money, and that he had falsely denied doing so in his testimony before the Grand Jury.* Indeed further, as the result of the Court's accompanying orders or rulings for the striking of testimony of various Government witnesses for failure to satisfy the "two witness" rule in perjury or because necessitated by excisions from the indictment dictated by other considerations (*infra*), the record establishes still more positively that the case as submitted to the Jury stood divested of any Mann Act allegations or connotations whatever, and that it consisted solely of the telephone items and the other special privilege items just mentioned—which, again, stood on the record as having no remaining connection with prostitution or Mann Act charges.

3. The Trial Testimony, and the Items Stricken Therefrom or Excluded From the Jury's Consideration

The following summary of the trial testimony covers each trial witness, in capsule form, which we believe is sufficient for the purposes of this petition; in the case of the witness Ruth Karsh, a more extensive description is needed and will be given in another connection *infra*.

Trainor, a prisoner at the Hudson County Jail (Tr. 17 et seq.) testified of a visit with his wife in the counsel room of the jail (no sexual relations alleged), food brought from

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* The Trial Court's rulings as to dismissals or excisions affecting the indictment appear at Tr. 1305-1307, 1334-1343, 1361 et seq., 1376-1377, 1761-1774, 1779-1784, 1787-1789; and see 22a-26a.

outside, and small payments to the defendant; an item related to liquor at the jail was stricken (31a; Tr. 18, 49, 52-54, 58-61, 107, 1787-1789). Mrs. *Taccetta* testified about private visits with a prisoner and small payments to the defendant, no sexual improprieties being alleged (31a; Tr. 110, 116-126, 141, 143-146, 166-168, 170). *Walendzinski* testified about obtaining more comfortable quarters for his young son at the prison and small payments to the defendant (no sexual connotations) (32a-33a; Tr. 171, 174). *Ross,* a prisoner at the jail, testified about visits from his wife, transfer to better quarters, telephone use, food received from outside, and small payments to defendant (no sexual connotations) (33a-35a; Tr. 222, 241-245, 267-271, 319-320, 323, 353, 361). Mr. and Mrs. *Schwartzer* testified about Ross' comfortable quarters and telephone use; a financial topic in their testimony was stricken (35a, 39a; Tr. 371 et seq., 619 et seq., 1321-1326). *Viola* testified about being patronized by another prisoner (Konigsberg), comfortable quarters, telephone use, and visits from his girl friend (Cisek); all Mann Act items in Viola's testimony were stricken (35a-38a; Tr. 386, 400, 408 et seq., 513-517, 1343-1344, 1377, 1759-1774, 1779-1784, 1787-1789). Miss *Cisek* testified about visits to Viola in private quarters and telephone calls (no sexual connotations) (38a; Tr. 518 et seq.). Miss *Karsh* testified about visits to a prisoner in the counsel room and payments to the defendant; all sexual or Mann Act items in her testimony were stricken or otherwise withdrawn from the Jury's consideration (38a-39a; Tr. 527 et seq., 1758, 1761-1774, 1779-1784, 1787-1789). *Pollack* testified about large payments to the defendant for special privileges including telephone use, liquor (stricken) and permission to leave the jail; all Pollack items relating to sex were stricken or

otherwise eliminated from the Jury's consideration (40a; Tr. 633 et seq., 1376-1377, 1760, 1787-1789). *Richardson* produced telephone company records (no probative connotations as to any issue except as to whether specific calls were made on specific telephones at the jail) (40a). *Plucino's* testimony (theater tickets in connection with Pollack and the defendant) were stricken (41a; Tr. 1326-1329). *Lovico* testified about Pollack's being outside the jail at a time when he was a prisoner there (no probative connection as to scienter on the part of the defendant) (41a-43a). *Carey* testified as Grand Jury foreman (purpose of the Grand Jury investigation) (43a). *Mallon* and *Mesnig* testified about Pollack's personal property records at the jail (no Mann Act connection shown in this testimony) (44a, 50a). The Government's final witnesses, Mrs. *Concetta Fiore* and *Joseph Fiore* added nothing on any Mann Act aspect (49a; Tr. 1682-1688, 1740-1743, 1746-1747).

The defense introduced character testimony (44a—Tr. 1918; Tr. 1395-1403). The defense also called three employees of the Hudson County Jail, Salvatore Joseph Amato (44a; Tr. 1404-1453), Samuel D. Grier (45a; Tr. 1454-1458), and Patrick Henry Kiernan (45a; Tr. 1458-1488), who testified to various exculpative facts and circumstances concerning procedures and happenings at the Hudson County Jail to which Government witnesses had testified.

The defendant, Henry B. McFarland, took the stand in his own defense (46a-49a; Tr. 1494-1670). The defendant answered all questions, and he denied the indictment charges and the accusations of the Government witnesses in all respects. The Trial Court's marshalling of defendant's testimony, in the instructions to the Jury, covers most of

the points which we would here emphasize (46a-49a); we would add the following: In regard to the alleged use of telephones by prisoners at the Hudson County Jail, petitioner gave what we respectfully consider was important clarifying and explanatory testimony. At Tr. 1519 petitioner stated that by law, every prison warden in the United States "Has the authority to permit telephone calls when he rules on it. That is a warden's right and that is in every institution in the country. He is the supreme authority in the jail". At Tr. 1540-1542 petitioner further explained that (evidently referring to the plenary authority of prison wardens as just noted) when the Grand Jury questioned him about telephone calls by prisoners, his answers denying that he had permitted such calls were prompted by his then impression that the Grand Jury's questions in that regard were focused on the prostitution aspect; in short, petitioner insisted in this trial, and we think convincingly, that he had no intention to deceive the Grand Jury by any such sweeping or unqualified denials (regarding use of telephones) as those which the Government contends were intended by him under Count Two, especially, of this indictment.

The foregoing represents, after elimination of the items mentioned as having been stricken or otherwise withdrawn from the Jury's consideration, the final residuum of the proofs on which this case went to the Jury—under the remaining (i.e., non-dismissed) counts of the indictment, Counts Two and Three, which as seen, carried no express Mann Act items and stood necessarily divested of any Mann Act connotations by reason of the Trial Court's overall rulings.* Indeed, even the summation to the jury by the

* The record references for those rulings are collected in the footnote on page 11, *supra*.

notably zealous prosecutor in this case was meticulously bare of any Mann Act or other "sex" references of any kind except for general remarks as to the purpose of the Grand Jury investigation (Tr. 1824-1871). Likewise the Court's charge to the Jury was absolutely devoid of any such references or connotations (14a-52a).

The rulings of the Court of Appeals in affirming the conviction will be discussed in pertinent aspects under our "Reasons" *infra.* Also the facts relating to our Question Presented no. 9, *supra,* as to the prosecutor's concealment of the psychiatric history of the witness Ruth Karsh, will be taken up in our discussion of that point under our "Reasons".

REASONS FOR GRANTING THE WRIT

I

In view of the elimination from the case, as submitted to the jury, of all Mann Act references except the purely formal continuing allegation of grand jury "purpose" or "materiality", i.e., in view of the fact that the case as submitted to the jury had been wholly divested of any of its original ostensible character as a "Mann Act perjury" case and had washed down to nothing more than a case of alleged Federal Grand Jury perjury in regard to a subject matter of a purely local or State cognizance, the judgment of conviction on a charge of perjury committed before a grand jury investigating Mann Act violations should be reversed, and the indictment dismissed, as being repugnant in the most fundamental sense to due process of law, the just and rational administration of federal criminal justice and even to the subject matter jurisdiction limitations which the Constitution imposes on the power of the United States to punish crimes.

This case has to be approached in terms of first principles. It is one of those criminal cases in which the fatal vice giving rise to the main ground for reversible error lies embedded in the very roots of the case and permeates its entire structure. Too many impermissible assumptions of a purely doctrinaire nature have to be indulged to justify this extraordinary Grand Jury perjury conviction.

As seen, Count One of the indictment,* which was stricken or dismissed, had been based on an express Mann Act item. Count Two dealt only with use of telephones. Count Three dealt with miscellaneous "special privileges." (Neither

* As previously noted, we print in Appendix 4 hereto, *infra*, the text of the entire indictment with use of italicized type to indicate what was withheld from the trial jury's consideration.

Count Two nor Count Three involved any express Mann Act items.) Count Four, which was stricken or dismissed, had involved express Mann Act items. In consequence of these eliminations from the indictment, and of the exclusionary rulings on testimony previously described, this case, in the posture in which it went to the Jury was a "Mann Act perjury" case *in name only*, totally divested of both all *charges* and all *proofs* in reference to any Mann Act aspects except the generalization that the Grand Jury had been investigating violations of the Mann Act; and petitioner found himself having the question of his guilt or innocence of federal Grand Jury perjury submitted for consideration by a trial Jury which had nothing before it except alleged perjury by petitioner in answering questions about purely local or State prison "housekeeping" matters involving telephone use and miscellaneous other petty privileges of prisoners, none of which retained any continuing probative or judicially cognizable connection with the original ostensible Mann Act subject matter before the Federal Grand Jury.

We suggested above that impermissible assumptions of an unwholesomely doctrinaire nature have to be indulged to justify the conduct, course and result of this most strange Federal Grand Jury perjury prosecution. One of these doctrinaire assumptions is that, on the basis of the prevailing Federal rule of Grand Jury "materiality"—whereby a perjury charge may be founded on false testimony having a "tendency" to "obstruct" the Grand Jury's investigation of a subject which it is "competent" to investigate—a perjury conviction can be had even though the alleged "materiality" has vanished from the case by the time it is submitted for the Trial Jury's consideration. The admittedly broad test of Grand Jury "materiality" just

mentioned (e.g., *United States* v. *Marchisio*, 344 F. 2d 653, 665 (C.A. 2, 1965); *United States* v. *Collins*, 272 F. 2d 650, 653 (C.A. 2 1959)) was never intended, we submit, to produce a result such as that which has come about in the instant case. If this is what the prevailing doctrine of Grand Jury "materiality" means, if the doctrine has this plenary or indeed rather this seemingly infinite scope, then any Federal Grand Jury could declare itself to be investigating any subject of Federal criminal "competence," and any witness whose allegedly false testimony arguably comes within the plenary canopy of "materiality" could be imprisoned for perjury, even though at the perjury trial the *probatum* as submitted to the trial jury has ended up being totally divested of any connection with the originally claimed topic of Grand Jury "competence." Nor is this frightening prospect rendered significantly less likely for future situations by considerations of whether a particular Grand Jury has been launched upon a particular investigation with the benefit of specific charges from accusing witnesses, rather than merely engaging in a roving investigation. The abuse of which we here complain in regard to doctrinaire utilization of the principles of Grand Jury "materiality" and "competence" is no less acute or constitutionally offensive when the accusatory testimony claimed to have justified Grand Jury "competence" washes out *in toto* at a subsequent perjury trial, as has happened in this case.

The situation may be analyzed along the following further lines:

1. The Trial Court should have granted the defense motions for acquittal on the entire indictment. Merely to determine, as the Trial Court did, that the technical test of

Grand Jury "materiality" under the prevailing general rule was satisfied as a matter of law, did not justify (much less require) the further determination that the case should be submitted to the Jury as a "Mann Act perjury case" after it had been so totally divested of its Mann Act aspects. The Trial Court should instead have made a determination as a matter of law, in the exercise of a wise legal judgment, that the conventional rule of "materiality" was intrinsically impossible of just application in this case because neither charges nor proofs remained in the case from which a Trial Jury could rationally and justly deduce a verdict of conviction for "Mann Act perjury". All that finally went to the Jury in this supposed "Mann Act perjury" case was the formalistic *rump* element of a *memory* of what had once been thought to be Grand Jury "materiality" and "competence" in this case. The sheer juridical irrationality of a contention that this case was rightly submitted to the Jury, or that it could be rationally decided by a Jury in terms of the indictment charges, presents analytical difficulties which defy ultimate logical or legal analysis, yet our minds tell us that what happened here was irrational and legally wrong. The analytical difficulty may perhaps be elucidated along the following further lines.

2. To apply the concepts of Grand Jury "materiality" and "competence" in such a manner as to allow a perjury conviction to be ultimately derived by a Jury from a record like the instant one, is to sacrifice the standards of rational criminal justice in favor of a kind of mere legal nominalism. Perjury is too grave a matter from the standpoint of both prosecution and defendant to be settled by legal nominalisms. Proof of criminal guilt—*a fortiori* in perjury—is *par excellence* and *de rigueur* a matter of the concrete, not of

the abstract or the nominalistic. What concrete proof did this Trial Jury have before it, indeed what concrete *charge* even was before this Jury, that could justify or enable the Jury to decide whether the defendant had violated the Federal prejury statute in the setting alleged by the indictment, namely, a setting of alleged Mann Act violations? Simply as a matter, then, of what a criminal trial jury should or should not be expected and allowed to do as "triers of the facts" upon a charge of grave crime carrying severe penalty, the intrinsic unsuitability of sending this case to this jury must be taken into consideration as a matter of law and of correct judicial administration.

3. In our preceding two numbered paragraphs we have been focusing primarily on the difficulties which this case presents from the standpoint of a rational system of trial by jury. Of no less importance are the challenging problems which the case insistently presents from the standpoint of the Judge—both at the trial and the appeal levels. In our opening remarks for this "Reason" I, we intimated the theme of which we now wish to speak more fully, namely, that the prevailing doctrines of Grand Jury "materiality" and "competence" should not be allowed to lead to unjust doctrinaire results. When an initially ostensible subject matter of Federal Grand Jury "competence" is later found to be—during the course of a Federal prosecution for perjury in the giving of "material" Grand Jury testimony "tending to obstruct" investigation of the "competent" Grand Jury subject matter—an empty abstraction for purposes of criminal prosecution or conviction, but when nevertheless such prosecution is allowed to proceed to conviction, the lawyer or Judge whose sense of proper constitutional tradition is called into play on the problem, cannot but be

concerned about the following questions: Has the defendant been convicted (as here) under an indictment which is defective for "failure to charge an offense", when the indictment is considered (as it must be) in the form and in the setting in which it was (here) submitted for the Jury's final consideration? Has the defendant been convicted, indeed further, for an offense *not charged in the indictment* (i.e., in this case, the alleged offense of having falsely denied to a Federal Grand Jury that he accepted payment for various "housekeeping" favors to prisoners in a local or State prison institution governed by State law)? This last, in turn, compels the even more fundamental and in fact classic question, a question at constitutional level, of whether the defendant has been convicted under an assertion of Federal criminal prosecutive authority for what plainly amounts to a perjury charge over which only the State of New Jersey could have constitutional jurisdiction, i.e., the charge that the defendant has falsely denied illegalities in the internal administration of a State prison institution, without any connotations which could justify the attaching of the Federal "jurisdiction"? In its largest (but at the same time in its most meaningful) sense the question becomes, finally, has the defendant been denied due process of law by reason of all of the above mentioned fundamental defects in the proceedings, including the Federal government's improper and unauthorized assertion of authority to prosecute and punish him for those particular matters (and only for those matters) which were found to be all that could properly be submitted for consideration by this Federal Trial Jury?

We earnestly state that we do not think we are speaking at all too loftily in advancing the foregoing argument as to the legal and constitutional improprieties of this perjury

conviction. As above said, we are convinced that this conviction violates "first principles", and if discussion of the case in those terms has inevitably taken us into a pretentious-sounding exposition smacking of a lecture on legal "classics", we respectfully state that the injustices to which we are here addressing ourselves do seem to us to require exactly this kind of fundamental, or "classical", appeal to "first principles".

The necessity we feel to plead this certiorari issue in the above manner reflects also that the case does not seem to be covered by decisional "precedent", so far as we can find. Doubtless this is attributable to the fact that no similar extraordinary deviation in the field of Anglo-American perjury prosecution has heretofore been essayed by any prosecutive authority or approved by any court of record, at least so far as the reported decisions reveal. In this apparently unique situation, then, principle must supply the lack of precedent. The Court of Appeals, in rejecting our contention as to the constitutionally incongruous and impermissible way in which the federal power to punish perjury has been applied in this case, spoke of "cloudiness" in our argument, and it charged us with not correctly understanding the purpose of the "materiality" rule under the federal perjury laws; the Court of Appeals summed up the matter by saying, "Once it be conceded that the Grand Jury was investigating matters within its jurisdiction, materiality to that investigation is the only link the Government must establish between the testimony and the federal criminal law"; and, the Court further said, "Applying these principles to this case, it is apparent that whether appellant was accepting money for allowing inmates unusual telephone privileges (the second count) and special

favors (the third count) would have a bearing on an investigation into whether prostitutes were being illegally transported to the jail" (Appendix 1 hereto, *infra*).

In our petition for rehearing in the Court below we tried to assure the Court that we do appreciate the analytical impact upon this case of the prevailing rule of Grand Jury "materiality". We have not been arguing in this case (at least we have not intended to argue) that by some anomalous process of retrograde or reverse "bootstrap-ism" the Grand Jury "materiality" literally vanished when the trial proofs washed out in the way they did in this case. The Court below apparently interpreted our argument as having amounted to nothing more than some such formulation as that which we have just paraphrased. Such was not and is not our intended theme. Our theme is, rather, that, in ultimate due process terms, it is wrong to let a Grand Jury "materiality" situation *of the kind here involved* result in a perjury conviction *under all of the circumstances here involved*. We were asking the Court below to see that, on the entirety of this trial record, an unyielding application of the conventional "materiality" rule turns that rule into a prosecutive instrumentality of a kind of blind injustice, with disturbing overtones moreover of excess of the federal jurisdiction to punish crimes. In effect, we were asking the Court below to exercise its supervisory power over the fair administration of federal criminal justice (cf. *United States* v. *D'Angiolillo*, 340 F. 2d 453, 456 (C.A. 2 1965), cert. denied 380 U.S. 955), by declaring that, in the overall circumstances of this case, the Constitution cannot tolerate conviction for perjury upon a merely literal application of the "materiality" rule. The Court of Appeals' opinion does not mention this theme of ours, except in one or two

tangential remarks. Our theme is not tangential for the purposes of this case; it is central to the case.

We have above spoken of this case as presenting an issue of due process of law; in our Question Presented no. 3, *supra*, we have urged that the due process question indeed is one of substantive and not only of procedural process. For, viewed in its fundamental constitutional aspect, the "anatomy" of this extraordinary Federal perjury conviction does pose nothing short of a challenge to the rule of substantive due process itself. The case goes beyond procedural due process. It enters the area of substantive due process because, in the last analysis, the case compels one to ask the classic question which familiarly defines what substantive due process is: Is it "reasonable"—i.e., is it substantive due process—to allow Federal prosecution and conviction for Grand Jury perjury in a matter so remote from any legitimate object of Federal concern? In this case, where the ultimate disposition condemning the defendant on a charge of grave crime and to serve a term of imprisonment has turned out to be a disposition based on literally nothing more than alleged improprieties in the internal management of a State or local prison institution, there being left in the case no remotest legitimate or realistic connotation of Federal jurisdictional concern (either legislative, executive or judicial), how can it be said that the substantive due process requirements of the Fifth Amendment have been obeyed?

II

Even if the Mann Act subject matter had not become washed out of this case, the allegedly continuing "telephone" subject matter of Grand Jury "competence" or "materiality" would stand constitutionally vitiated for any purpose relevant to this case because the supposition that a Federal Grand Jury may investigate "illegal" use of telephones (as for prostitution activities) arises from a quite erroneous and indeed unconstitutional reading of the Federal Communications Act.

In our "Reason" I, *supra,* we were addressing ourselves to the question of the various ways in which the elimination of the Mann Act subject matter vitiated for Federal jurisdictional and constitutional purposes all remaining subject matter under the indictment; and implied in our argument *supra* was the contention that the alleged Federal Communications Act subject matter of the use of telephones by prisoners at the Hudson County Jail for such Mann Act purposes had necessarily also been eliminated from the case with the elimination of the apparently indispensably generating subject matter derived from the subsequently eliminated Mann Act suppositions. The topic to which we now turn has to do with the Federal Communications Act subject matter in a more distinct sense. The question may be stated thus: Even if the Mann Act subject matter had not become eliminated from this case, could the Federal Communications Act subject matter in any event be validly included in this kind of indictment; or, can there legally or constitutionally be a Federal Grand Jury investigation of any supposed Federal "crime" of violating the Federal Communications Act by using or permitting the use of telephones to violate the Mann Act?

Over the past several years, it has apparently been taken for granted in some lower Federal Courts that the answer to a question of this latter type would be in the affirmative. We submit that such affirmative view proves, upon examination, to be wrong; and we believe that the following will demonstrate that the prevailing affirmative view concerning this question is based upon authorities and reasoning which have not been well thought out either in statutory or constitutional terms.

The view that one can "violate" the Federal Communications Act by "illegal" use of a telephone, as by using a telephone for gambling, prostitution activities, narcotics violations and the like, apparently found its origin in two decisions of the Third Circuit (the *Marcus and Testa* cases, *infra*) which were followed by the Court below in *United States* v. *Harris*, 334 F. 2d 460 (C.A. 2 1964), reversed on other grounds, 382 U.S. 162, and in the instant case.

Let us look behind what may be termed the *stare decisis* "folk lore" of the *Harris* decision in the Second Circuit (334 F. 2d 460). The latter decision held that where a Grand Jury subpoena stated that the Grand Jury was investigating alleged violations of the Federal Communications Act, 47 U.S.C. §§203 and 501, where the witness declined to answer questions concerning a telephone call from Florida to New York City for the purpose of promoting an illegal dice game in Florida, and where the witness after receiving immunity under §409(1) of the Communications Act persisted in his refusal to answer, the witness was properly convicted of contempt. The Court said (334 F. 2d at p. 463):

> " * * * In support of its own position the government weaves the following argument: The Federal Com-

munications Act makes unlawful the act of any person causing a telephone company to extend telephone services not provided for in its tariffs, 47 U.S.C. §§ 203, 501. The tariff of the American Telephone & Telegraph Company, joined in by the Southern Bell Telephone & Telegraph Company, states that telephone service shall 'not be used for an unlawful purpose.' Thus, the government contends, when an individual uses telephone facilities for an unlawful purpose he causes the telephone company to extend to him services not provided for in its tariffs and consequently to violate the Communications Act.

On facts quite analogous to those here presented, the Third Circuit held that the government had sufficiently established the necessary link of a possible violation of the Communications Act, on the theory which the Government here proffers. Marcus v. United States, 310 F. 2d 143 (3 Cir. 1962), cert. denied, 372 U.S. 944, 83 S. Ct. 933, 9 L. Ed. 2d 969 (1963). See also United States v. Testa, 326 F. 2d 730 (3 Cir.), cert. denied, 376 U.S. 931, 84 S. Ct. 701, 11 L. Ed. 2d 652 (1964). Moreover, the government refers us to indictments which have been returned in other districts charging violations of the Communications Act under similar circumstances. Finally, we must recognize that the scope of the grand jury's investigation is not limited to the specific questions put to Harris. Indeed, further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises, and corruption in connection therewith, which would certainly constitute a violation of the Communications Act, at least to the extent of any participation by telephone company representatives. On balance, we hold, as did the Third Circuit, that the government has established that the grand jury investiga-

> tion here is a proceeding 'based upon or growing out of [an] alleged violation of [the Federal Communications Act].' "

Thus, as we said, the Second Circuit in *Harris, supra*—and evidently again in the instant case—accepted as controlling the decisions of the Third Circuit in *Marcus* v. *United States,* 310 F. 2d 143 (C.A. 3 1962), cert. denied 372 U.S. 944; and *United States* v. *Testa,* 326 F. 2d 730 (C.A. 3 1964), cert. denied 376 U.S. 931. Let us examine the *Marcus* and *Testa* cases.

The *Marcus* decision contains no indication that the Government had presented for the Court's consideration, or that the Court had considered, any such theory as the one mentioned in the *Harris* quotation, *supra,* where, as the Court put it, "the Government weaves" its argument to support the Communications Act subject matter. Likewise in the *Testa* case in the Third Circuit (326 F. 2d 730) (also cited in *Harris, supra*), where the *Marcus* ruling was followed, there is no indication that the Court was proffered (by the Government) or itself considered any such theory as to the Communications Act subject matter (see 326 F. 2d at p. 734, fn. 3, dissenting opinion of Judge Kalodner on petition for rehearing).

In short, *Marcus* and *Testa simply took it for granted* that the Communications Act subject matter there tendered by the Government as having been a proper subject of Grand Jury investigation, was a legally and constitutionally valid subject matter for such Grand Jury purposes. There is no reasoning, no analysis, no doctrinal justification, indeed nothing except purely assumptive and conclusory decisional "foundation" in *Marcus* and *Testa* for the important new assertion of Federal Grand Jury competence

or jurisdiction—and, in turn, Federal criminal jurisdiction as such—there involved.

We therefore respectfully submit that the *Harris* case, in the Second Circuit, with its free reliance on the *Marcus* and *Testa* cases, has unjustifiably announced a *fait accompli* by a supposed judicial evolution to the effect that the Government, so far as appears, is practically without restriction in using one or another of the specific-subject-matter Federal criminal statutes, in conjunction with the Communications Act, as a means of inquiring into practically anything which zealous prosecutive officials may choose to denominate, no matter how conclusorily, as possessing or potentially possessing some "crime" involvement.

We would call attention to the following additional defects in the reasoning of the above mentioned Communications Act "crime" cases:

It does not appear that any point was raised or considered in the *Harris, Marcus* or *Testa* cases as to the constitutional question of whether a "violation" of the Communications Act may be founded upon "violation" of a "tariff" filed with the Federal Communications Commission by a private company. From the *Harris* case quotation *supra,* and from the language of §§203 and 501 of the Communications Act (47 U.S.C.), it is manifest that Congress has not itself set up the "prohibitions" against "unlawful" use of telephones within the meaning of the *Harris-Marcus-Testa* theory, but that it is the Telephone Company (or Companies) which has "legislated" these criminal "statutory prohibitions". In short, the criminal prohibition that is mounted by the *Harris-Marcus-Testa* theory derives from what amounts in effect to an unconstitutional delega-

tion of legislative power to private persons (the Telephone Companies). Moreover, under that theory, these private persons are permitted thus to "legislate" criminal prohibitions through the medium of filed "tariffs" which, to be perfectly realistic, virtually no one except a few telephone company officials and a few Federal Government officials ever see. There is no slightest clue or hint in the Congressional legislation itself that such "tariffs" are to be thought of by the ordinary citizen as importing substantive criminal prohibitions as to the purposes for which telephones are to be used; §203 of the Communications Act may be read in vain for any such clue or hint, that provision on its face being nothing more than a law relating to schedules of charges for telephone service, overcharges, rebates etc.; and §501 of the Communications Act being merely a "general penalty" provision. Authorities enunciating the axiom that legislative power may not be delegated to private groups are, e.g., *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Wagner* v. *Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922); and authorities collected in *Davis, Administrative Law* (1951), s. 21, and *Gellhorn, Administrative Law* (2d Ed. 1947), pp. 88-89.

Furthermore, there is an even more fundamental defect in the *Harris-Marcus-Testa* theory, namely, that the statute (47 U.S.C. §203) pursuant to which such Telephone Company "legislation" is supposedly "enacted" (*per* Telephone Company tariffs) does not actually authorize such delegated legislative power to be exercised by the Telephone Companies. The latter statute speaks only of schedules of charges, and of over-charges and rebates, etc., declaring that such schedules of charges (i.e., the "tariffs" as they are commonly referred to) shall be filed with the Federal

Communications Commission, and provides further that such schedules are to show also "the classifications, practices, and regulations affecting such charges". This latter language as to "regulations" etc. "affecting such charges" is the nearest that §203 comes to even remotely supporting any suggestion that the Telephone Company tariffs might contain provisions other than the "charges" themselves, and this language in regard to "regulations" etc. goes no farther than to authorize such "regulations" etc. *"affecting * * * charges"*. In other words there is nothing in §203 about "regulations" in any sense beyond regulations concerning the charges payable for services rendered by carriers under the Federal Comunications Act. Which is to say that there is no authorization in §203 for any such Telephone Company tariff "regulation" as is supposed to be applicable in the *Harris-Marcus-Testa* cases, i.e., a prohibition against using a telephone for an "illegal" purpose. Nor can we find any regulation by the Federal Communications Commission implementing any such supposed statutory authorization—see *Code of Federal Regulations,* Title 47 ("Telecommunications").

In *Ambassador, Inc.* v. *United States,* 325 U.S. 317, the Court, in ruling that Telephone Company tariffs could legally regulate the charges made by hotels in connection with telephone use by guests, said (p. 323):

> "Of course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. * * *"

This is a recognition by this Court that Telephone Company tariffs of charges for telephone service are not to be

countenanced as a device for imposing substantive regulatory controls upon the conduct or activities of telephone users. While the Court in the *Ambassador* case, *supra*, also said that the Communications Act "recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities" (p. 323), it is evident that the Court was there speaking strictly in the context of a Federal regulatory power to prevent "an unjust or unreasonable discrimination or preference" (*ibid*) in the schedules of rates and charges for communication services; and while the Court also said in this same portion of the opinion in the *Ambassador* case that "the supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is 'charges, practices, classifications, and regulations for and in connection with such communications service' * * * 47 U.S.C.A. §201(b) * * * " (*ibid*), the Court in this language likewise was speaking of the subject matter and aim of the Communications Act in regard to maintaining "just and reasonable" tariffs of communications company charges for services. Besides, in referring to §*201(b)* of the Communications Act (in the portion of the *Ambassador* opinion last quoted), as allowing the broad range indicated for the Federal regulatory power under this statute, the Court was *not* referring to §*203*;* that provision, as we have seen, is cast expressly and solely in terms of "schedules of charges" and "regulations" etc. "affecting such charges." If Congress had intended to let the Telephone Companies themselves, *via* their filed tariffs, import into the Federal regulatory (and indeed criminal prohibitory)

* Under which the Telephone Company "tariffs" are filed.

scheme under this legislation, provisions concerning "illegal" use of telephones, it could readily have done so. There is not one word in the Federal Communications Act from which any such Congressional intention may be spelled out. And it is no answer to this to say that the Federal Communications Commission itself, under the broader language of §201(b)—upon which the Court commented in the *Ambassador* case, *supra*—could adopt general regulations concerning such "illegal" use of telephones, because even if it were conceded (which we respectfully decline to do) that the Commission could in this manner create *criminal prohibitions* of this drastic sort when Congress has not seen fit to do so, such *arguendo* concession would not justify the conclusion that the Telephone Companies themselves are given this ominous power to incorporate such criminal prohibitions in their filed tariffs.

We thus see the following really extraordinary situation under the *Harris-Marcus-Testa* theory:—The Communications Act lets the Telephone Companies file "schedules of charges" (tariffs) which may contain also "regulations" etc. "affecting such charges" (§203). The Telephone Companies then file tariffs which go drastically further by including a prohibition against use of telephones for "illegal" purposes (e.g., gambling, prostitution, etc.). The Government then invokes such manifestly *ultra vires* tariffs as assertedly forming the basis for next invoking §501 of the Communications Act which, as noted is merely a "general penalty" provision to punish persons who violate the Communications Act. Not only, then, is there an absolute lack of statutory authority for a Telephone Company tariff prohibition against "illegal" use of telephones, and not only

(consequently) is there an absolute lack of any basis for spelling out a statutory violation upon which the general penalty of §501 may operate, but, even more strange, there would have to be an abrogation of the constitutional ban against delegation of legislative power to private persons* in order to sustain as valid this remarkable attempted reading of the statutory language.

If we are correct in our above argument that no constitutionally maintainable Federal criminal jurisdiction of the type referred to arises under the Communications Act, then Counts Two and Three of the within indictment—being the remaining counts and the only conviction counts—must for that reason alone fall insofar as they involve the subject matter of use of telephones. That is to say, the references in the indictment to the Federal Communications Act, *viz.*, the asserted basis for the charges relating to use of telephones by prisoners at the Hudson County Jail, are the sole foundation for Count Two of the indictment, and they form also an important part (albeit in a more generalized, but nevertheless essential, form) of the foundation for Count Three of the indictment—these being the only two counts which were submitted to the Jury, and on both of which petitioner was convicted. In other words, the original indictment charges were dependent upon the Mann Act matters in the first instance, to which in turn there was adjoined by the Grand Jury a Federal Communications Act subject matter (which of course was purely derivative from the Mann Act matrix); then the Mann Act items

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* *A fortiori* in the circumstances of cases like *Harris* (and our case) this traditional constitutional ban would have to be abrogated in regard to the most potent of all forms of legislative power, the legislative power to declare what are crimes.

went out of the case as seen, but there remained for the Jury's consideration (under the Court's instructions) the Federal Communications Act items (in a form no longer integral with the Mann Act items). It is submitted that our above presentation under this "Reason" II requires the conclusion that no residual or continuing legal force supposedly deriving from those Federal Communications Act items can avail to justify the within conviction of petitioner.

III

The improper conduct of the Government in not sooner revealing its information about the relevant psychiatric history of the witness Ruth Karsh, misconduct for which both of the Courts below reprimanded the Government, resulted in the apparently irretrievable lodging on the trial record of the inflammatory direct testimony of Miss Karsh, created thereby a situation in which it was impossible to disabuse the jurors' minds of the lurid testimony thereby contaminatingly infused into this intrinsically sensational case, caused inevitably a denial of fair due process trial, and requires this Court's intercession in the interest of the decent administration of Federal criminal justice.

The Government called to the stand in this trial Miss Ruth Blanche Karsh (38a-39a; Tr. 527 *et seq.*). She had been confined at the Hudson County Jail as a material witness in 1963 or 1964 (Tr. 528-529). A friend, Joseph Fiore, had also been at the jail at that time on a charge of armed robbery (Tr. 530). After Miss Karsh's release she visited Fiore three or four times a week, most of the time in the counsel room on the first floor of the jail (Tr. 530-533). She said that nearly each time she came to visit Fiore she gave

the defendant small sums, $2 or $3, the largest payment being $5 (Tr. 536-587—see also Tr. 537-538). While the following items of Miss Karsh's testimony were ultimately stricken or otherwise not submitted to the Jury, they were received in evidence and came to the jury's attention in the witness' direct examination: (1) At Tr. 538-545 she testified to having met or seen a person named Konigsberg in the presence of the defendant at the jail and that later the defendant spoke to her in a manner susceptible of meaning that he was suggesting she have intercourse with Konigsberg at the jail. (2) She testified that she had sexual relations at the jail with Fiore (Tr. 546); and see Tr. 546-561, a lengthy questioning of Miss Karsh by the prosecutor evidently designed to elicit from her that the defendant knew she was having relations with Fiore at the jail, but this latter question failed of its purpose. As mentioned, the foregoing testimony of Miss Karsh concerning alleged improprieties involving Konigsberg and Fiore was eliminated from the case under the various exclusionary and limiting rulings of the Court later in the trial. In the instructions to the Jury, when the Court marshalled the evidence concerning Miss Karsh, all reference to the above items was omitted except for a general reference to her having seen Konigsberg in the defendant's office and her having had a conversation with the defendant concerning Konigsberg (39a; Tr. 1910).*

A development of the first importance occurred when Miss Karsh came under defense cross examination. It emerged that she had a grave history of mental disturbance

* The Court in the instructions just mentioned did not refer to Konigsberg by name, but to a man depicted in certain photographs (Government exhibits 20 and 21).

apparently covering the period of the alleged happenings to which she testified in this trial, and that the prosecutor had evidently known of this but had not disclosed it to the defense or to the Court.* Miss Karsh's history of psychiatric trouble only came to defense counsel's attention by accident, as it were, when at Tr. 572-573 the witness was being cross examined about her employment and she happened to state that prior to her then employment she had been "in a hospital" for eight months, and a moment later she revealed that it was "Manhattan State Hospital", an institution for the mentally ill (Tr. 573). The prosecutor at once objected on the ground of irrelevancy to the issues in this case (Tr. 573).** The Court permitted defense counsel to continue, and when the witness next stated that she had been released from Manhattan State Hospital in September 1965†, defense counsel requested permission to make an application at the Bench (Tr. 573). In the ensuing colloquy, at the Bench, defense counsel protested against the prosecutor's having offered Miss Karsh as a witness under the circumstances above disclosed, and requested a continuance of his cross examination of Miss Karsh "until I can have access to the records of the Manhattan State Hospital to see what diagnosis was made and to see if this witness is competent to testify in this case in view of what may

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* A disclosure to the Court, but not to the defense, may perhaps be said to have been made by the prosecutor in the course of submitting Miss Karsh's "3500" materials for the Court's inspection after Miss Karsh had concluded her direct testimony (*infra*), but as indicated in the text above there was no previous disclosure.

** It is thus to be noted that the prosecutor not only had failed to disclose what he knew of Miss Karsh's psychiatric history, but also that he evidently considered it proper to *continue* to have this important subject matter withheld from attention.

† Her within testimony was being given on May 6, 1966.

have happened eight months ago, which was so close to the time that she testified she visited the jail" (Tr. 575; and see Tr. 574-575). The prosecutor insisted, in effect, that nothing in the above described developments unexpectedly revealed for the first time by the defense cross examination was cause for any defense objection (Tr. 576). There followed a brief discussion (still at the Bench) between the Court and the prosecutor as to production of the hospital records for preliminary inspection by the Court *in camera*, the prosecutor still expressing a strong reluctance if not opposition, and the prosecutor adding that defense counsel's statements that it was wrong for the Government not to have disclosed its knowledge of Miss Karsh's psychiatric history was "reprehensible" and "unethical" on the part of defense counsel (Tr. 578; and see Tr. 576-578).* The Court then directed the prosecutor to procure the hospital records and that in the meanwhile the defense cross examination of Miss Karsh should proceed a little further (Tr. 579).

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* *The expressions of indignation by the prosecutor above mentioned—in which the prosecutor was reproaching defense counsel for reproaching the Government in connection with its non-disclosures concerning Miss Karsh—make it pertinent for us to state as follows at this juncture in our presentation herein:—This trial was attended by many verbal clashes between the prosecutor and defense counsel. It is our own view that these incidents were generated by the nature of the case and by the prosecutor's failure to appreciate the problems of basic justice which had been created by the very bringing of this extraordinarily peculiar "Grand Jury perjury" prosecution. As we indicated in other connections *supra*, this case both in its prosecutive inception and in its probative consummation at the trial betrays a failure of proper prosecutive judgment in the enforcement of the Federal perjury laws. It is our earnest belief that this was never a proper case for Federal perjury prosecution, but that a feeling of over-zealous commitment to the case on the part of the prosecutor in charge inevitably led to excesses by the prosecution during this trial. See also the defense motions for mistrial on grounds of prosecutive misconduct (Tr. 1287-1296, 1305—with which see, e.g., Tr. 86-87, 109-110, 150-156a, 314-315, 362 et seq., 515-516).

Miss Karsh's next testimony was that she had gone to Manhattan State Hospital in February or March 1965 because she was "very upset", that she was subject to episodes of becoming "scared or something" and would go see a doctor when such occurred, that this had been going on for about five years since her mother died, that she had twice been a psychiatric patient at Mt. Sinai since 1961, once for three months and once for two weeks, that she had gone to Manhattan State Hospital directly from her last stay at Mt. Sinai, that she was a psychiatric patient at Mt. Sinai when she testified before the instant Grand Jury in April 1965, and that (apparently) she had not told the Grand Jury that she was then at Mt. Sinai (Tr. 579-585).

Following this testimony of Miss Karsh defense counsel again asked for permission to defer his further cross examination pending an opportunity to examine the medical records, which was granted (Tr. 585-588). Over the following trial weekend the Court inspected the hospital records of Miss Karsh. At the next trial day the Court, in the robing room, asked the prosecutor what he knew of Miss Karsh's medical history when he brought her in to testify; he replied that he "knew that she had been under some treatment for an emotional disturbance"; when the Court asked him whether his investigation had ended there or whether he had done anything to find out the nature of the emotional disturbance, the prosecutor replied that "That was all I knew about it", and "I did not make any effort to inquire at the places that she was treated or the doctors that treated her"; when the Court asked him whether he had made any effort to determine whether Miss Karsh

was competent to testify, the prosecutor replied, "Not other than my own estimate of her * * * I was very well satisfied that she was in all respects competent * * * "; when the Court asked him whether he had made any inquiry as to whether Miss Karsh might be exposing herself "to any dire act on her own part* in the event she became emotionally disturbed", the prosecutor replied that "I understood * * * the possibility that she might be exposing herself to a strain undoubtedly, but I was satisfied from talking with her that she was able to withstand it"; the prosecutor further stated that he had made this determination by himself without participation by any one in the United States Attorney's office and that none of his superiors in that office had received a report from him as to Miss Karsh's medical history; he answered affirmatively the Court's question, "You took this strictly on your own responsibility?" (Tr. 591-593).

The Court then announced (still in the robing room) that it had examined the hospital records, which "disclosed that this young lady witness has had a series of problems for some time", and that the diagnosis at Manhattan State Hospital was "schizophrenia (other types) [*sic*] and schizo-affective" (Tr. 593). A staff conference note or summary at Manhattan State Hospital on September 17, 1965 reported her "much improved" and recommended that she be discharged in her own custody, which was done (Tr. 593-594). The Court then stated that "under the circumstances, I will permit the cross examination to go forward" (Tr. 594). The Court added that in view of the unusual

* The Court had evidently seen in the hospital records (*infra*) that she had suicidal tendencies.

circumstances—i.e., that the witness had been exposed to direct examination without disclosure of the medical history and the question now was as to whether she should be subjected to cross examination—it had discussed the matter with Chief District Judge Ryan, and that after the Chief Judge had received a summary of the medical reports which Judge Croake (the trial Judge herein) had examined, the Chief Judge had agreed that the cross examination should go forward (Tr. 596-597). The Trial Court also said (Tr. 597):

> "* * * it would have been much more preferable if this matter had been explored more thoroughly by the Assistant United States [*sic*] and he had consulted with his superiors, and a determination made from the medical standpoint. I don't think these are matters that can be determined by lawyers. Those are matters that should be determined by certainly a psychiatrist and someone familiar with the history of this particular patient."

The Court then granted permission for both counsel to examine the medical records before resumption of the cross examination (Tr. 597). The prosecutor then objected that the medical records might contain private matters not relevant to this case and that such be withheld from defense counsel (Tr. 598). To this the Court replied that the medical records were voluminous, the prosecutor was putting too much of a responsibility upon the Court, and "* * * You have assumed a great responsibility, Mr. Fanning. You have taken a burden on your shoulders that you should not have done without at least consulting a doctor * * * in view of the fact that you have presented her here as a witness to this Court and without having disclosed

these facts, and they were only discovered after the completion of her direct examination and at the beginning of the cross examination, we now find ourselves in the posture where we have direct testimony, and this is a criminal case and even if we did the best we could by striking testimony of this nature, I think it is in the record * * * " (Tr. 598-599). The prosecutor then essayed another limiting tack, viz., that defense counsel should be confined, in examining the medical records, to dates directly affecting the issues of this trial, which the Court declined to do in view of the voluminous physical character of the records (Tr. 599-600). The Court added that the prosecutor was "taking the precaution a little late * * *. Any precaution you should have taken with regard to this young lady you produced as a witness on this stand and examined on direct examination and had difficulty in bringing forth certain matters and had to refresh her recollection several times, don't you think you are bringing this matter to the attention of the Court at a little late date?" (Tr. 600)

When the prosecutor thereupon again complained of defense counsel's statement that the prosecutor had attempted to conceal the fact of Miss Karsh's medical history, the Court drew attention to the following item which we are regretfully obliged to mention: The prosecutor had clipped from one of the "3500" exhibits handed to defense counsel an item disclosing that Miss Karsh had been treated psychiatrically in Mt. Sinai Hospital. This item had not been clipped from the exhibits as handed up to the Court, but it was subsequently clipped from the exhibit before turning the exhibit over to defense counsel, and it appears that the Court itself had not previously been aware that

the item thus clipped from the exhibit pertained to the subject matter here in question; the prosecutor defended having done this on the ground that "the Government's position was that it was not relevant to her direct testimony" (Tr. 600-601).*

Defense counsel was then given the item which the prosecutor had clipped from the above mentioned exhibit; the item was read into the record by defense counsel (still in the robing room) (Tr. 604-605):

> "She advised that after her release she attempted suicide by jumping in the river and is presently under treatment at the Psychiatric Institute, Mount Sinai Hospital, New York 29, New York. Miss Karsh exhibited her Mount Sinai identification card which showed her unit number to be 161930 and her last visit December 11, 1964. She stated that she is presently unemployed and exhibited a letter addressed to her from P. J. Maguire, Acting Manager, Office Personnel Placement Center, New York State Employment, 575 Lexington Avenue, New York, New York."

The prosecutor then placed on the record that the Government had no knowledge that Miss Karsh had come to the Grand Jury from a hospital (Tr. 605).

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* The prosecutor's surprising zeal in this case was rather dramatically instanced by his immediate next remarks to the Court following the above described incident which, one would have thought, might have had a moderating effect. Instead, the prosecutor went on to make a reference to a scandalous item in one of the "3500" documents relating to the witness Mrs. Janet Taccetta (p. 12, *supra*) to the effect that on three occasions the defendant himself had propositioned her, and the prosecutor started to add that "Miss Karsh, too, has told me that she too—", when the Court, evidently alarmed over these wholly irrelevant alleged disclosures, exclaimed, "Mr. Fanning, what are you talking about? You are putting something on the record. This may be reviewed by another Court." (Tr. 603).

The above described proceedings in the robing room were then adjourned to allow counsel to examine the medical records (Tr. 605a-606), after which defense counsel announced (again in the robing room) as follows (Tr. 606-607):

> "I have examined the records of this young lady. She has a long history of psychiatric difficulties. She has had several pregnancies and births out of wedlock. I have no intention of asking her any of those questions for fear that because of her history contained in the records that I examined, this young lady may be thrown back into a fit of depression or into an active episode of psychosis.
>
> She has been diagnosed as a schizophrenic. She appeared before the grand jury on April 1, 1965. She was certified by two physicians to be in need of commitment for her own protection to the Manhattan State Hospital on May 4, 1965.
>
> There is a history in the petition that she has been under treatment at Mt. Sinai psychiatric division for three months prior thereto and had been transferred from the Mt. Sinai psychiatric division to Bellevue Hospital, where the assistant director, Dr. Walker, petitioned her to be certified as in need of care.
>
> After she had been in Manhattan State Hospital from May 11th until July of 1965, the assistant director of Manhattan State Hospital asked that she be continued in custody and care, and from the witness' own admission, she spent some eight months there.
>
> Your Honor, I am going to develop these facts just on the record in front of the jury. I am not going to further cross-examine this girl for her own protection."

These proceedings in the robing room concerning Miss Karsh were concluded with a collateral discussion about Miss Karsh's prior pregnancies (the prosecutor being concerned that such should not be brought out on cross examination) and with the following remarks by the Court (Tr. 608):

> "* * * I would say that had this matter been brought to the attention of the Court in advance of her being presented as a witness, her direct testimony and the procedure might have been different, but I am confronted with the situation we now find ourselves in, and we will proceed."

The cross examination of Miss Karsh was then resumed (Tr. 610 *et seq.;* and see 39a). She testified that she had been treated at the Mt. Sinai Psychiatric Division on and off between 1961 and 1965; that in April 1965 she was transferred to the Bellevue Hospital Psychiatric Division*; while she was at Bellevue, New York Supreme Court Justice Joseph A. Sarafite had certified that she be transferred to Manhattan State Hospital for psychiatric treatment in May 1965**; and it appeared that the latter transfer-certification papers certified Miss Karsh for treatment as a "mentally ill" person (May 11, 1965), that on July 9, 1965 the Manhattan State Hospital found that she needed continued care and treatment, that her stay at Manhattan State Hospital was about six months, and that the diagnosis was that she was a schizophrenic (Tr. 611-613). The Trial Court further placed on the record that she had been discharged

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* Her Grand Jury appearance in this case was on April 1, 1965, as noted.

** Miss Karsh said that she had voluntarily requested this transfer (Tr. 612).

from Manhattan State in her own custody on September 17, 1965 (Tr. 614-615).

The prosecution witness whose testimony was undoubtedly most damaging to the defense, in the eyes of the Jury, was Miss Karsh, one of the few witnesses who testified as to any sexual improprieties. The only other witnesses who testified on that subject were Pollack (whom the Court itself expressly disparaged in the instructions to the Jury), and Viola whose criminal record and motivational status affected his credibility (pp. 12-13, *supra*). To be sure, the testimony of all three of these witnesses concerning sexual improprieties was eliminated from the Jury's consideration. However, atmospherically it could not be completely eliminated from the case, and we submit that we are therefore entitled to address ourselves, as we are here doing, to the issue of the prejudice caused by the prosecutor's conduct in not having revealed that Miss Karsh was a young lady witness of exceedingly dubious testimonial competence by reason of her unfortunate history of mental disturbance.

In *Powell* v. *Wiman*, 287 F. 2d 275, 278-279 (C.A. 5 1961), a State-originating *habeas corpus* case, relief was granted to the prisoner on the ground that the totality of circumstances relating to the State's failure to disclose or its suppression of evidence as to the credibility (including history of mental disturbance) of an accomplice witness resulted in fundamental unfairness amounting to denial of due process.

See also the recent Annotation in 7 A.L.R. 3d 8, at 144, collecting additional cases as to the duty of a prosecutor to disclose information tending to show mental incompetence of a witness.

W e are not overlooking that the prevailing general rule allows testimony by a claimedly insane or mentally incompetent witness if competence is found to be sufficient at the time of trial or in relation to the subject matter of the testimony. However, important and delicately difficult questions of fair legal procedure still attend any such situation, as is brought out in *Wigmore on Evidence* (3d Ed.), vol. II, §§ 228, 233, 492-497, where the author notes, *inter alia,* that the weight of authority apparently favors the requirement of an anterior finding by the Court alone (without Jury) as to competence (see especially *id.* § 497). We emphasize this last because the conduct of the prosecution in this case obviously thwarted the making of any such anterior judicial finding; and we submit that this, in itself, denied petitioner a fair trial.

The Court of Appeals in its opinion (Appendix 1 hereto, *infra*), stated as follows concerning the Government's above described conduct in regard to the witness Ruth Karsh:

> "We have carefully considered the question and do not find any harm to appellant from this incident: Defense counsel eventually learned all the facts of the witness's history in time to make full use of it on cross-examination, did get before the jury the essential information affecting her credibility, did not ask for any further adjournment, and did not move to strike the witness's direct testimony on the ground of incompetence. Cf. *Kyle* v. *United States,* 297 F. 2d 507, 513-14 (2d Cir. 1961). The fact that the witness had been a patient in a mental hospital did not render her incompetent as a matter of law, see 2 Wigmore, Evidence §497 (3d ed. 1940), and the trial judge handled the matter properly. However, this does not mean that the prosecutor's conduct was justified. We do not understand his position that

it was irrelevant for defense on cross-examination to bring out that a key prosecution witness had recently been in a mental hospital for several months. Moreover, the Government's silence as to the prior psychiatric history of the witness was improper, as was its own apparent failure to check further on the competence of the witness before calling her.[4] It must be emphasized that the Government cannot play it 'close to the vest' in administering federal criminal justice, when duty and conscience dictate that certain facts should be disclosed to insure a fair trial. Matters bearing on the competence of a witness to testify are of the gravest import, and the prosecutor may not disregard them or leave it to chance that his adversary will learn of them. Cf. *Powell* v. *Wiman*, 287 F. 2d 275, 278-79 (5th Cir. 1961); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136 (1964).

The judgment is affirmed."

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[4] The prosecution had not seen the voluminous hospital records, but was aware that the witness had been treated psychiatrically at Mt. Sinai Hospital.

In our petition for rehearing in the Court of Appeals we had to deal rather extensively with the above-quoted portion of the Court's opinion, because after the opinion had been rendered the Government wrote a letter to the Court of Appeals striving to justify its conduct as to Miss Karsh and requesting that the Government be absolved of impropriety. Respectfully deeming that this branch of the case is of sufficient importance to justify a full presentation before this Court notwithstanding the conventional limitations of space in a petition for certiorari, we print in our Appendix 6 hereto, *infra*, the entire text of the portion of our petition for rehearing in the Court below which deals

with the subject of the Government's conduct in regard to the testimony of Miss Karsh; including in said portion of our petition for rehearing, printed in Appendix 6, *infra*, is the Government's letter just mentioned in which the Court below was asked to absolve the Government of impropriety. In our petition for rehearing we went into additional details—i.e., additional to our presentation *supra* under this "Reason" III—as to the trial proceedings affecting this topic, and we take it that this Court may wish to examine with special attentiveness our Appendix 6 hereto, *infra*. We also urged in our petition for rehearing to the Court below (Appendix 6, *infra*) that the Court had evidently not given adequate consideration to our main point in regard to the Karsh episode, our main point having been that the Government's improper nondisclosure of Miss Karsh's psychiatric history had prevented us (and the Trial Court) from having an opportunity to litigate or to consider the issue of whether Miss Karsh should be allowed to take the stand as a Government witness at all, and that the Government's improper conduct had resulted in lodging Miss Karsh's outrageous testimony on the record as a *fait accompli* on direct examination; we urged in our petition for rehearing in the Court of Appeals that the prime issue was not, as the Court of Appeals apparently thought, whether we ultimately got proper opportunity for cross-examination of Miss Karsh, but that the prime issue instead was whether we had been deprived of our justly entitled opportunity to prevent her direct testimony altogether.

On rehearing the Court of Appeals amended its opinion on the subject of the propriety or ethics of the Govern-

ment's conduct in regard to Miss Karsh, and while the blow or reprimand of impropriety was perhaps slightly softened against the Government in the amendment to the Court of Appeals' opinion, the impact of the amended opinion is not significantly different in its reprimand to the Government. The amendment to the opinion below is printed as Appendix 2 hereto, *infra*.

While the Court below does not appear to have considered the Government's conduct concerning Miss Karsh as justifying reversing the conviction, we respectfully request this Court to make independent evaluation, and we submit that certiorari is justified on this point alone in the present case. *Cf. Berger* v. *United States*, 295 U.S. 78.

We would respectfully recall our earlier suggestion that in its entirety, this case is irreconcilable with a lawyer's sense of both procedural and substantive due process. We have previously referred to the prosecutor's apparent over-zealousness throughout this trial (fn., p. 38 *supra*). This is a case in which the prosecutor's over-zealous commitment to a prosecutive cause which intrinsically was non-maintainable, led the prosecutor into trial excesses, evidently from a wrongful zeal to keep alive a prosecution that should never have been given seed or at least should have been allowed to die on the vine once the supposed sources of its generating vitality were shown to have ebbed away. The prejudicial conduct of the prosecutor in this case forms a proper part of the overall due process inquiry here; it should be taken into consideration that the United States Government has here not only brought a bad and unjust criminal prosecution against a citizen but has pressed its wrongful cause with an insistency, an

intensity, indeed a militant fierceness, without which there may well have been a better chance for justice to the defendant in the jury room—and, yes, a better chance also that the Trial Judge himself might have implemented more resolutely the ultimate logic of his own rulings of law which, we say, pointed so plainly to the necessity of terminating this case without submitting it to a trial jury. The Government's disproportionate militancy in this strangely synthesized "perjury" case cannot be ignored as a factor in evaluating the large due process considerations which we advance in this petition.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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